2006

State of Utah v. Randy Shea Gardner : Brief of Petitioner

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

STATE OF UTAH, Plaintiff / Respondent vs. RANDY SHEA GARDNER, Defendant / Petitioner	:	Case No. 20060281-SC

BRIEF OF PETITIONER

ON CERTIORARI REVIEW TO THE UTAH COURT OF APPEALS

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JURISDICTION OF THE UTAH SUPREME COURT

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated §§ 78-2-2(3)(a) and 78-2a-4.

ISSUES PRESENTED AND STANDARDS OF REVIEW

Whether due process necessitated review of the cross-examination testimony of one of the State's witness[es], where Petitioner claimed entrapment, the recorded transcript does not include the cross-examination testimony, and the court of appeals did not address the district court's proposed reconstruction of that testimony.

On certiorari review, this Court examines the decision of the court of appeals for correctness. *State v. Brake*, 2004 UT 95, ¶ 11, 103 P.3d 699.

CONTROLLING STATUTORY PROVISIONS

All relevant statutory provisions are set forth in the Addenda of the Petitioner's Brief.

STATEMENT OF THE CASE

A. Nature of the Case

The Defendant and Petitioner, Randy Shea Gardner, appeals from the decision of the Utah Court of Appeals affirming his conviction by a jury in Third District Court for Distribution, Offering, Agreeing, Consent or Arranging to Distribute a Controlled Substance (Methamphetamine), a second degree felony.

B. Lower Court Proceedings and Disposition

Gardner was charged by Information with two (2) counts of Distribution, Offering, Agreement, Consenting or Arranging to Distribute a Controlled or Counterfeit Substance, a Second Degree Felony, at Utah State Prison, in violation of Utah Code Ann. 58-37-8(1)(a)(ii) (R. 1-3). A Preliminary Hearing was held on April 2, 2002 after which the trial court bound Gardner over on both charges, and Gardner entered pleas of not guilty (R. 294).

Prior to trial, Gardner, through counsel, filed a motion to dismiss on grounds of entrapment (R. 59-68). A motion hearing was held on December 13, 2002 (R. 288). The trial court heard testimony in regards to the entrapment motion. The trial court denied the motion to dismiss on grounds of entrapment (R.

288: 107-110). On January 13, 2003, the court issued its written Findings of Fact and Conclusions of Law and Order (R. 119-22).

A jury trial was held on February 26-28, 2003 after which the jury rendered a verdict of guilty as to Count One (1) Distribution, Offering, Agreeing, Consent or Arranging to Distribute a Controlled Substance (Methamphetamine), a second degree felony; and a verdict of not guilty as to Count Two (2), Distribution, Offering, Agreeing, Consent or Arranging to Distribute a Controlled Substance (Heroin), a second degree felony (R. 279, 291: 402). At trial the jury was instructed on the defense of entrapment (Jury Instructions nos. 32 and 33) (R. 211, 212-13).

Gardner, who was incarcerated during the pendency of this case and trial, was sentenced on April 22, 2003, to a consecutive term of one (1) to fifteen (15) years in the Utah State Prison to the commitment he was already serving (R. 292). Gardner is presently incarcerated at the Utah State Prison. The notice of appeal was filed on April 28, 2003 (R. 281).

On appeal, Gardner filed a motion for summary reversal because the cross-examination portion of Leland Clark's testimony was not recorded. On March 23, 2005, the Court of Appeals denied the motion but remanded the matter to Third District Court for a determination of whether the record could adequately be reconstructed.

On September 30, 2004, the Third District Court held a hearing on reconstructing the missing trial testimony (R. 298). The district court continued

the matter to allow counsel an opportunity to figure out the problem with the tapes (R. 298: 4).

On November 9, 2004, a second reconstruction hearing was held in district court (R. 297). At the hearing, defense counsel Wall stated that the missing portion of the testimony was the most significant part because the defense was attempting to establish at trial that there was an entrapment. Wall's perception was that he fully and completely met all of the elements of an entrapment.

Wall further stated that during the cross-examination, he recalled the witness stating that he had urged the defendant to engage in the unlawful conduct. However, the prosecutor, Cope, recalled that the witness was given four words to select from and that he selected the word "urge" (R. 297: 5). Wall submitted that there would be an unclear record as to what in fact occurred at trial and whether or not the elements were fully met (R. 297: 5).

Cope argued that Gardner was not prejudiced, because even if there was no record of what the jury heard, the jury heard all the testimony and they deliberated upon all the facts that were presented to them (R. 297: 11). Cope felt that he could reconstruct Wall's cross-examination of the witness to a certain extent.

On December 21, 2004, a final reconstruction hearing was held in district court (R. 296). The trial court concluded that with Cope's reconstruction using the available testimony that the record could be satisfactorily reconstructed (R. 296: 5). The trial court further found that the defendant was not prejudiced by the incomplete record (R. 296: 6).

On January 26, 2006, the Utah Court of Appeals issued an unpublished, per curiam decision affirming Gardner's convictions. The Court of Appeals concluded that the record was complete enough to determine that the State presented sufficient evidence for a jury to find that Gardner acted freely and voluntarily, and was not entrapped into committing the offense. *State v. Gardner,* not reported in P.3d, 2005 UT App 21, (Utah App. 2006) (included herein in the Addenda; for easy reference paragraph numbers have been added to the copy of the court of appeals' decision). The Court of Appeals also concluded, citing *State v. Russell*, 917 P.2d 557, 559 (Utah App. 1996), that a defendant is not entitled to a new trial whenever a gap in the record exists just in case the gap may contain some error. *Id.* at ¶ 4.

Gardner filed a timely petition for writ of certiorari with this Court which was ultimately granted. A copy of this Court's order granting that petition is included in the Addenda.

STATEMENT OF RELEVANT FACTS

A. Testimony from the Jury Trial

1. Testimony of Leland Harris Clark

Clark, a fellow prisoner at the Utah State Prison and a friend of Gardner's, testified that Gardner talked with him about bringing drugs into the prison through a med tech friend of Gardner's (R. 289:109-111, 115). Clark said that Gardner told him that he had pills delivered to himself a couple of times but that he did not

have a connection who could supply the drugs and he couldn't talk the guy into doing it (R. 289:115). Clark said he reported this information to investigator Pepper "because it was against the law." (R. 289:114-116). Clark told Pepper that the med tech friend worked in their section delivering medications and told Pepper where he lived (R. 289:116).

Clark testified that he received instructions from investigator Pepper to have Gardner call the phone number Pepper gave Clark, and tell Gardner that this was the number of Clark's connection to get some drugs or have them brought in (R. 289:118-119).

Clark testified he gave the number to Gardner, who called it using Clark's prison PIN number, and then told Clark he talked to the connection about getting cocaine and heroin and that he was excited about it, that it sounded like it was going to be a good deal (R. 289:119-120). Clark told Gardner he would help him sell (R. 289 at 120).

Clark also testified that Gardner told him after the phone call that he was trying to get it lined up with the med tech to call Pepper as the connection and that the med tech was on Gardner's prison calling list and that he had been calling him (R. 289:121). Clark testified that he believed Gardner spoke with the med tech's wife and that he was having a hard time persuading him, and it took him a couple of times over a week or two to get things lined up (R. 289:121). Clark thought Gardner made five or six calls total between investigator Pepper and the med tech and/or his wife (R. 289:122).

Clark testified that Gardner told him the med tech was poor and that it probably would only be a one time thing if the med tech did it because he was having money problems (R. 289:124). Clark stated Gardner told him that the med tech was definitely scared but that he was interested, seeing it as a potential to make some money (R. 289:124). Clark also said that he had no knowledge of the med tech bringing in coke or heroin before, but only prescription drugs (R. 289: 124). Clark also testified that Gardner told him that the med tech and investigator Pepper did talk on the phone at some point but that Clark was not sure who called whom (R. 289:125).

2. Testimony of Donald Peter Buckley, Jr.

Buckley was employed at the Utah State Prison as a medic beginning in October 2000 (R. 289:130-131). A couple months after beginning work, Buckley ran across Randy (Shea) Gardner while doing the "pill line," or dispensing prescribed medications to the inmates (R. 289:130-131).

On February 18th Buckley believes, he received a call from Gardner after working a 24 hour shift (R. 289:141). During said conversation, Buckley vaguely remembers talk of a manila envelope (R. 289:142).

Later in the evening on February 18th, Buckley made a call to Gardner's contact and asked him what the job was (R. 289:143). Buckley believed the person's name was Kevin (R. 289 at 143). Kevin proceeded to tell him that it was a delivery job, delivering drugs into the prison, specifically methamphetamine (R.

289:143). Buckley told Kevin that he was not willing to risk his EMT certification, his house, or his family to do that (R. 289:143).

When Buckley saw Gardner, during pill line, a day or two after the phone call with Kevin, he basically told him the same thing – that there was no way possible that he was going to put his job or family in jeopardy (R. 289:144).

3. Testimony of Kevin M. Pepper

In 2001, Kevin M. Pepper (Pepper) was working undercover at the Utah State Prison on a case against Gardner and no other cases (R. 290:167). In late 2000, Pepper received word that Clark, a prisoner, wanted to see him (R. 290:169-70). On January 10, 2001, after knowing Clark had wanted to see him for several weeks, Pepper met with Clark (R. 290:170-72). Clark wanted to discuss with Pepper contraband coming into the prison and mentioned Gardner and an EMT named Don who did the pill line (R. 290:171). Pepper instructed Clark to keep his eyes and ears open while he attempted to verify some of the information Clark had given him (R. 290:172).

During this initial conversation, Clark told Pepper that Don, the EMT, was friends with Gardner and had been for some time, and that he was bringing contraband into the prison (R. 290:175). Clark said that Gardner wanted to find a source to get some dope to bring into the prison or have brought into the prison (R. 290:175).

On January 18th, 2001, Pepper had Clark transported off the property to further inquire about the investigation and sign him up as an informant (R. 290:

181). During this meeting, Pepper instructed Clark about how he wanted the case to proceed (R. 290:182). Specifically, he wanted Clark to provide to Gardner his undercover name, Kevin Gilmore, and have Gardner contact him using Clark's PIN number (R. 290:182). Pepper came up with this plan and these were the only instructions given to Clark; they were never changed (R. 290:182, 184).

4. Testimony of Randy Shea Gardner

Gardner denied ever arranging or planning to bring controlled substances into the prison on or about February 12th, 2001 (R. 291:281). On the 28th or 29th of January, after hearing Gardner talking with his friend about the financial devastation of med-tech Buckley, Clark asked Gardner if he thought his friend would be interested in some help on how to get out of financial devastation (R. 291:282). Clark told Gardner that he had a friend who had numerous connections to money through businesses or self money, who was pretty financially stable and in a position to help other people through a loan or a possible job (R. 291:283). Gardner asked Clark if he thought maybe his friend could make a loan or recommend a job. Gardner thought maybe the guy had a salvage yard or something like that for his friend to get a job (R. 291:283).

Clark then provided Gardner with the names of Kevin and Jackie Gilmore and told him to have Buckley get a hold of them or pass his phone number to Buckley or Buckley's phone number to Kevin (R. 291:283).

Gardner then wrote a letter to Buckley to tell him of a possible way for him to get out of financial devastation and that he would get ahold of him in the future

and pass the information along (R. 291:284). After Gardner wrote the first letter, he talked to Clark who gave him Kevin's phone number and an address (R. 291: 284). Gardner then wrote to Buckley to give him the number and address (R. 291: 284).

On February 12th, Clark provided Gardner with his inmate PIN number on a piece of paper as well as Kevin's home phone number and Gardner went to the phone to call him (R. 291:285). After the phone call, Gardner went and talked to Clark for a few minutes and then went to take a shower (R. 291:285). Gardner said he called Kevin to find out his information and to give him Buckley's phone number so they could get together to talk about the job (R. 291:285). Gardner stated that during the conversation with Kevin things went "a little out of the way I thought they were going to go" (R. 291:285). Kevin started talking about other stuff other than the job (R. 291:285). During this conversation, Gardner went along with the comments Kevin was making because Clark had told him that his friend was the kind of person they really wanted to keep happy, appease him, so Gardner construed that to mean Kevin was important or somebody that has influence somewhere (R. 291:286). Gardner went to talk to Clark about it and Clark told him, "This is something that me and Kevin are doing on the side. It has nothing to do with you. I'll talk to him and leave you out of further conversation like this" (R. 291:285).

Gardner also talked to Buckley about contacting this Kevin and told Buckley he wasn't really sure what it was about but that "to my knowledge,

there's going to be a manila envelope with some money involved" (R. 291:288). In response to why he said that, Gardner stated, "Leland (Clark) had – Leland had brought up a manila envelope to me along the lines of when we were talking. I went and asked him about ounces and black and white. And I had brought up in the manila envelope in a conversation earlier, when I had spoke with Kevin and Leland had told me, Just tell him to use a manila envelope" (R. 291:288). Gardner wasn't sure how this manila envelope was going to be involved (R. 291:289).

Gardner was concerned about what would happen if he did something contrary to the circumstances that Clark and Kevin put him in (R. 291:290). He was afraid due to Kevin's comments about not wanting him to get in trouble, or his "ass in a jam" and the recent stabbing and having been jumped at the prison once before and perhaps someone having friends to retaliate against him (R. 291: 290-91).

Gardner then talked to Clark, and told him he had just talked to Buckley, and reminded him again to get ahold of Kevin (R. 291:291). During the phone conversations, Kevin's mention of his plans to go to New York gave Gardner the impression that Kevin was some big shot who had connections in New York and made him want to placate him a little more (R. 291:292). Gardner also got the impression not that Kevin was trying to impress him, but that he was trying to let him know, "Don't screw me over" (R. 291:293).

Gardner testified that Clark asked him almost daily about whether he had received a response from Buckley and that as the time passed with no response

from Buckley that Clark became more agitated, more irritable towards Gardner, and they went from hanging out every day to Clark only talking to him once in a great while, that Clark started avoiding him (R. 291:303). Gardner stated that Clark's language changed from pleasant conversation to more aggressive and hostile, emphasizing the need to get ahold of Buckley and get it taken care of (R. 291:303).

B. Testimony from the Motion Hearing regarding Entrapment

1. Testimony of Leland Harris Clark ("Jazzman")

Clark is an inmate at the Utah Department of Corrections and was an inmate in February of 2001 (R. 288:25). Clark has known Kevin Pepper since August of 2000 (R. 288:25). During the latter part of January, 2001, Clark gave information to Pepper about a somewhat close friend of Gardner who was a med-tech and was bringing dope in and could bring dope in (R. 288:27). Clark testified that initially he got information from his own observations of things going on in the prison, then he nosed around and eventually Gardner told him what was going on (R. 288:27). Clark testified that Gardner told him that it started when Gardner and his cell-mate were getting pills from the med-tech, because the med-tech's wife was like Gardner's sister – they grew up together (R. 288:27).

Clark testified that Gardner told him about things that had already happened and things that were going on right then (R. 288:27). Clark testified that he shared all of this information with Pepper (R. 288:28). Clark testified that

Pepper instructed him to keep him posted and let him know what was going on and if Gardner had anything planned and what was going to come in (R. 288:28). In exchange for this information, Clark proposed that Pepper provide him with a letter to the Board of Pardons for consideration and a transfer to another facility (R. 288:28). Clark also required "[h]ousing ... and a time cut" (R. 288:28).

Clark testified that from the end of January until the end of February he talked to Pepper close to ten or fifteen times about things he had heard or things that he knew from Gardner (R. 288:28). During the same timeframe, he talked to Gardner every day – they were out on the same recreation schedule and lived two or three cells from each other (R. 288:29).

Clark testified that Gardner said that "he didn't have any connections as far as drugs, you know, but he'd like to get some lined up because, you know, if we could work something out as a partnership, if I could get the dope lined up, he could – he could have it brought in and we both could make some good money" (R. 288:29). Clark indicated to Gardner that he could do that (R. 288:29). Clark then talked to Pepper about it and they planned to have Clark give Pepper's phone number to Gardner as Clark's drug connection (R. 288:30). Clark did not tell Gardner that his "connection" worked for the Utah State Prison system. Instead he let him believe that Pepper was his connection for drugs on the streets and that he wanted to get something into the prison to make some money himself (R. 288:30).

Clark testified that he did not recall making any specific promises to Gardner about how much money he could make or how lucrative it was to do this,

he just remembered that the partnership was 50-50 (R. 288:30). Clark testified that he talked to Gardner about how much money it was possible to make in such an endeavor, but he did not recall the numbers (R. 288:31).

Clark was asked if he urged, encouraged, or pressured Gardner to participate in this enterprise and Clark answered that he urged him. Clark told Gardner that he could make him some money, too. Gardner told Clark that the med-tech was about to lose his house and he wanted to do it one or two times because he wanted to do something to help him (R. 288:31). Gardner also told Clark that he wanted to transfer out-of-state, possibly to Washington. Clark told him he wanted to get some money for transfer, too (R. 288:31).

Clark testified that Gardner reported to him several times about the conversations he had with Pepper. Gardner indicated that it sounded good and that he was going to work try to put him in touch with the med-tech (R. 288:32).

Clark's impression was that Gardner was enthusiastic about the prospects (R. 288:32). Clark never indicated to Gardner that any negative things would happen if he did not go through with the deal (R. 288:32). Clark testified that both he and Gardner were nervous about selling dope inside prison (R. 288:32). Both of their fears centered around getting caught (R. 288:33).

Clark recalled that the last time he spoke to Gardner about the enterprise was in February of 2001 (R. 288:33). Clark was transferred at the end of February and the last conversation with Gardner took place within a day or the same day of the transfer (R. 288:33). During the last conversation with Gardner, Clark testified

that they talked about "trying to get it lined up or he was – Mr. Pepper was calling the med-tech on the street, was supposed to line that up – could talk to the - or Mr. Gardner talk to the med-tech and told him that my connection was going to call him and talk to him and line things up" (R. 288:34). Clark testified that the name of the med-tech was "Don" (R. 288:34) and he saw "Don" five days a week when he came into their section and delivered pills (R. 288:34).

Clark testified that he had first been sentenced to prison in 1989 for writing bad checks or fraud. Clark admitted that fraud is lying. Clark testified that he had been in prison probably eight years since 1989, but that it wasn't continuous (R. 288:35). Clark testified that he was sentenced in January of 1999 for attempted security fraud and that is why he was in prison in February of 2001(R. 288:35). Clark wanted to be transferred out of state because he knew that this enterprise was going to have some ramifications and being in the population would be a little rough (R. 288:37).

At the time, Clark was not talking to Pepper about any other inmates (R. 288:37). Clark did not recall intercepting and delivering to Pepper "kites" from any prisoner other than Gardner (R. 288:37). Clark did not remember the specific month that he began being housed with Gardner, just that it had been some time the previous year (R. 288:37). Clark agreed that the dates September of 1999 to January 5, 2001 were about right (R. 288:38). Clark testified that Gardner went to another unit to live for a while and then he came back within a month of this incident (R. 288:38).

Clark testified that he had been talking with Pepper regarding Gardner prior to the time that Gardner was taken out of the unit and it was during that time that he became aware of the relationship between Gardner and Buckley, the med-tech. Clark informed Pepper of the relationship and that Buckley was giving contraband material to Gardner prior to leaving the unit in January (R. 288:39). Clark did not observe the transfer of contraband, he was told about it from Gardner (R. 288:40).

Clark testified that a "kite" is a slip of paper passed between prisoners facilitating communication. Clark testified that he did not recall intercepting any "kites" from Gardner, but he did receive some "kites" from Gardner and passed them on to Pepper (R. 288:40). Clark testified that he understood after his conversation with Pepper about the benefits he wanted to receive that he would need to provide further information to Pepper in order to get all of the benefits he wanted (R. 288:41).

Clark had discussions with Gardner, prior to his removal in January of 2001, about his relationship with Buckley (R. 288:41). Clark was aware of the close relationship between Gardner and Buckley's wife from January of 2000 to the time that Gardner was removed from the unit in January of 2001 (R. 288:42). Clark knew that the close relationship had gone on for many years and that the Buckley family was having economic difficulty, could not meet his monthly bills, and was considering bankruptcy (R. 288:42). Clark knew from his conversations with Gardner that Gardner was very concerned about Buckley's situation (R. 288:43). Clark did not know that Gardner had a girlfriend (R. 288:43).

Clark testified that some time in January of 2001, Gardner was removed for a short period of time from the unit he was in with Clark. Gardner was then returned to the unit. When he returned, Clark was aware that arrangements were going to be made through Pepper for telephone calls to be made (R. 288:45). Clark testified that it is his understanding that prison officials determine where people live in the units of the Utah State Prison and it was through the prison officials that Gardner was returned to the same unit Clark was in (R. 288:46). Clark knew that his conversations with Pepper were tape recorded, but he never saw any written reports that Pepper had made about their conversations (R. 288:46). The conversations occurred on the unit phone and Clark was aware that the unit phones could be recorded (R. 288:47).

Clark urged Gardner to get involved in this arrangement with Pepper (R. 288:47).

Clark stated that Gardner came to him excited about making money and he just encouraged him and told him it would be great. They talked about it every day – the kind of money there was to make, their connection for the drugs. and somebody to bring it in (R. 288:48). Clark had to tell Gardner that Pepper was available in order to make the money and Clark initiated the conversation with Gardner about "Kevin" being out there to provide money. Clark referred to "Kevin" as a Mr. Moneybags and indicated that this person was worth millions of dollars and was "extremely well-heeled" (R. 288:48). Clark indicated to Gardner that "Kevin" could give him a job whereby he could make a lot of money. Clark

then used the information he had about Gardner's relationship with Buckley's wife and their bankruptcy situation to develop an avenue whereby this whole transaction could occur (R. 288:50).

Clark provided Gardner with the telephone number for "Kevin" after Clark and Pepper had actually talked about how the particular structure for this transaction would be put in place (R. 288:51).

For his participation, Clark was transferred out of state and he received a letter to the Board and is just waiting for some court proceedings to get his time cut (R. 288:51). Clark's current release date is June of 2006. Clark has been convicted of over 10 felonies. Not all the convictions are fraud. His convictions include bad checks, theft, burglary, embezzlement (R. 288:52).

Clark had never spoken to Deputy District Attorney Cope prior to this hearing and all of his communication about this case had been with Pepper. Clark never had any contact with Buckley about this deal. Clark reported to Pepper what Gardner told him and he never exaggerated, embellished, or made up details (R. 288:54).

SUMMARY OF THE ARGUMENT

The Fifth and Fourteenth Amendments to the Constitution, which protect individuals from any governmental deprivation of life, liberty, or property with the due process of law, applies to the appellate process. Because Utah has passed

legislation regarding the recording of criminal proceedings, it is bound to apply that legislation in accordance with the requirements of due process.

While a complete, verbatim record of all court proceedings may not be compulsory, decisions from the United States Supreme Court as well as this Court imply that it must be a record of sufficient completeness to permit proper consideration of the appellant's claims.

Where, as here, the cross-examination testimony of the witness most critical to the establishment of a defendant's affirmative defense is not recorded, fundamental fairness demands that a defendant not be required to pursue his appeal while hobbled by an incomplete record.

Due process is a flexible concept based on the concept of fairness, and "should afford the 'procedural protections that the given situation demands.'" *Low v. City of Monticello*, 2004 UT 90, ¶15, 103 P.3d 130, 134 (Utah 2004) (citations omitted). Because Gardner's claims of trial error cannot be adequately reviewed without Clark's cross-examination testimony, fundamental fairness and due process demands that he be granted a new trial.

ARGUMENT

Due Process Requires That Gardner Be Granted A New Trial Where The Recorded Transcript Does Not Include The Cross-Examination Testimony Of The Critical Witness To Gardner's Entrapment Defense, Because Gardner Was Deprived Of His Constitutional Right To Meaningful Appellate Review

Notions of fundamental fairness are protected by the Fifth and Fourteenth Amendments, which "prohibit[] any state deprivation of life, liberty, or property without due process of law." *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 2600 (1972). The United States Supreme Court has applied this guarantee under a two-step analysis, addressing first "whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of 'life, liberty or property," and second "what procedures constitute 'due process of law.'" *Id.*

Here, the individual interest concerned is that most basic American concept, liberty – specifically, the deprivation thereof consequent to a criminal conviction. Thus, the question before this Court requires a determination of those procedures due a criminal defendant in pursuing an appellate review of his conviction when part of the trial transcript is missing.

The United States Supreme Court has determined that the guarantee of due process extends to the appellate process. *See Evitts v. Lucey*, 469 U.S. 387, 392, 105 S.Ct. 830, 834, 83 L.Ed.2d 821 (1985) (Where "a State has created appellate courts as 'an integral part of the ... system for finally adjudicating the guilt or

innocence of a defendant," ... the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution," *quoting Griffin v. Illinois*, 351 U.S. 12, 18, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1956)).

The district courts of Utah are courts of record. Utah Const., art. VIII, §1; Utah Code Ann. §§ 78-1-1(1),(2), 78-1-2 (1987). As such, a record of all its official proceedings are to be made. Utah Code Ann. § 78-56-105 (1997) (*see* Addenda). Judges "are required to make a record of the proceedings they conduct. Ordinarily, the record consists of a verbatim transcription or recording *of the entire proceeding*." *Liska v. Liska*, 902 P.2d 644, 649 (Utah App. 1995) (emphasis added). Having established a statutory requirement for the recording of court proceedings, Utah courts should be bound to apply that requirement fairly and uniformly. While a verbatim record may not be required, it should be "a 'record of sufficient completeness' to permit proper consideration of'" the appellant's claims.'" *Mayer v. City of Chicago*, 404 U.S. 189, 193, 92 S.Ct. 410, 414, 30 L.Ed.2d 372 (1971), *quoting Draper v. Washington*, 372 U.S 487, 496, 83 S.Ct. 774, 779, 9 L.Ed.2d 899 (1963). "Generally, a record is adequate *if it permits appellate review*." *Liska, supra*, 902 P.2d at 649 fn. 6 (emphasis added).

While the focus of the Supreme Court's decisions cited above addressed providing transcripts to indigent appellants, the language used is at least instructive. In *Griffin*, for example, a decision on the merits of the appeal was

necessarily dependent upon a *sufficient transcript* of the trial court proceedings. *See* 351 U.S. at 13-14, 76 S.Ct. at 588.

Utah cases that have approached the issue presented by the instant case include *State v. Tunzi*, 2000 UT 38, 998 P.2d 816 (Utah 2000) and *State v. Taylor*, 664 P.2d 439 (Utah 1983). In the former, the videotape of the second day of the defendant's trial could not be located and was therefore not transcribed for the record. *Tunzi,* 998 P.2d at ¶2, 817. This Court ordered a new trial, observing that "attempts to reconstruct major portions of records often prove to be futile because such reconstructions often fail to provide the detail necessary to resolve the issues on appeal. The burdens and futility associated with reconstructing a record are increased exponentially when the issue on appeal concerns the sufficiency of the evidence supporting a conviction, as it does here." *Id.* at ¶3.

Similarly, in *Taylor*, this Court ordered a new trial in a case challenging the adequacy of the trial court's jury voir dire because the audiotaped questioning had a number of inaudible responses. *Taylor*, 664 P.2d at 445-447. In so ordering, this Court noted that it could not assume what the jurors' answers showed when they were "totally absent from the record and c[ould] not be reconstructed by agreement of the parties." *Id.* at 447.

While neither *Tunzi* nor *Taylor* addressed the due process implications of an incomplete or inadequate record, this Court nevertheless implied that a

meaningful appeal could not be accomplished absent a record that sufficiently memorialized the issue presented.

This Court has also found plain error when a trial court fails to enter statutorily mandated written findings, reasoning that "only when such steps are taken can this Court properly perform its appellate review function." *State v. Labrum*, 925 P.2d 937, 940 (Utah 1996), *quoting State v. Nelson*, 725 P.2d 1353, 1356 n. 3 (Utah 1986); *see also State v. Eldredge*, 773 P.2d 29, 35 (Utah), *cert. denied*, 493 U.S. 814, 110 S.Ct. 62, 107 L.Ed.2d (1989); *State v. Matsamas*, 808 P.2d 1048, 1051 (Utah 1991). Again, implicit in this line of cases is the assumption that a meaningful appeal can only be accomplished with enough of a record to review the appellant's claims.

Utah's Court of Appeals has explicitly held that the government's "improper recording and maintenance of the ... record is a due process violation in that it deprived [appellants] of their right to a meaningful review." *West Valley City v. Roberts*, 1999 UT App. 358, ¶7, 993 P.2d 252, 255 (Utah App. 1999) (audiotape malfunction at housing code hearing necessitated a new hearing, despite presence of documentary evidence). In another case, an equipment malfunction resulted in a failure to record almost two hours of the appellant's criminal trial. *State v. Russell*, 917 P.2d 557, 558 (Utah App. 1996). Though the Court of Appeals affirmed the conviction with the observation that *Taylor* "does not require a complete record so appellate counsel can go fishing for error; it only

requires that there be a record adequate to review specific claims of error already raised," *Russell*, 917 P.2d at 559, the court found the case to be "troubling":

> It seems unfair that the great majority of convicted defendants have the luxury of searching the record for error, while an unfortunate few who encounter equipment snafus or lost reporter's notes must rely only upon the memories and notes of those present to reconstruct what happened and what errors might have been made. Additionally, this rule may tend to promote disingenuousness on the part of appellate counsel. Case law suggests if there are numerous alleged mistakes, a new trial must be held unless the entire record can be satisfactorily reconstructed.

Id. at 559, n. 1. Yet, despite its professed concern with "the unfortunate few who encounter equipment snafus," *Id.*, the Court of Appeals in this case did not even consider the attempted reconstruction it had ordered. The Court of Appeals, in affirming Gardner's conviction, found that "the record on appeal is complete enough to determine whether Gardner freely and voluntarily committed the acts in question because the State's case-in-chief is complete and the missing testimony would, at most, be inconsistent or contrary evidence." *State v. Gardner*, 2005 UT App 21, ¶ 5. This conclusion begs the question: despite the "completeness" of the State's case against Gardner, the entrapment defense is a

factor tending to raise a reasonable doubt that the defendant freely and voluntarily committed the offense charged. *See State v. Curtis*, 542 P.2d 744, 746 (Utah 1975) ("the only requirement on the defense of entrapment is that it be sufficient to raise a reasonable doubt that the defendant freely and voluntarily committed the crime").

Because Gardner's entrapment defense relied heavily on Clark's testimony and because Gardner's trial counsel perceived that he had elicited testimony establishing entrapment on cross-examination (R. 304-305), a review of Clark's cross-examination was critical to a fair determination of issues presented by Gardner's appeal. This is especially so where defense counsel observed that the trial had produced "additional evidence that was not heard at the motion hearing" on the entrapment issue (R. 290:280). Again, the Court of Appeals could not have meaningfully reviewed the sufficiency of the evidence or the correctness of the trial court's denial of the motion for a directed verdict absent the primary evidence introduced on entrapment. In completely disregarding the import of Clark's cross-examination testimony, the Court of Appeals effectively reduced Gardner's constitutional right to confront the witnesses against him to a mere formality.

Other states have considered and determined that a sufficiently complete record is necessary to a meaningful appellate review. *See, e g., People of the State of Colorado v. Killpack*, 793 P.2d 642, 643 (Colo.App. 1990) ("When testimony this crucial [addressing defendant's mental state] is in dispute and the precise

language used is critical, reconstruction is not an appropriate remedy for the missing transcript. ...While we agree that loss of a portion of the complete trial record does not automatically require reversal, nonetheless, when a defendant can show that the incomplete record "visits a hardship upon [the appellant] and prejudices his appeal" reversal is proper," internal citation omitted); *People of the State of New York v. Hussari*, 17 A.D.3d 483, 794 N.Y.S.2d 64 (NY 2005) ("When 'a record cannot be reconstructed because of the lapse of time, the unavailability of the participants in the proceeding or some similar circumstance, there must be a reversal,'" internal citations omitted); *State of Lousiana v. Ambeau*, 930 So.2d 54, 59 (La.App. 4 Cir. 2006)("Material omissions from the transcript of the proceedings at trial bearing on the merits of an appeal require reversal"); *State of North Carolina v. Sanders*, 312 N.C. 318, 320, 321 S.E.2d 836 (N.C. 1984) (because "meaningful appellate review of the serious questions presented by defendant's appeal is completely precluded by the entirely inaccurate and inadequate transcription of the trial proceedings and that no adequate record can be formulated," judgment is vacated and new trial ordered); *State of Washington v. Thomas*, 70 Wn.App. 296, 298, 852 P.2d 1130 (1993); *United States v. Brown-Austin*, 34 M.J. 578, 582 (ACMR 1992) (while a "verbatim transcript is not constitutionally required for appellate review, ... [t]he government has the burden of rebutting the presumption of prejudice which results when there is substantial omission from the record").

In the instant case, the State's key witness and confidential informant, Leland Clark, was cross-examined at trial regarding his status as an agent for the government; his formulation, with Officer Pepper, of a plan to bring drugs into the prison, which he then "urged" Gardner to follow, and Gardner's close living proximity to Clark during this sequence of events (R. 304-305). Gardner's trial counsel also offered the observation that Clark's testimony differed notably from the pretrial evidentiary hearing (R. 304-305). Defense counsel's memory of this cross-examination contrasts significantly from that of the prosecutor (R. 300-302). This cross-examination testimony went unrecorded and therefore was not transcribed (289:127). Because this testimony, if it occurred as defense counsel remembered it, would have established the defense of entrapment,[1] there can be no meaningful review of Gardner's claims regarding the sufficiency of the evidence against him, the denial of his motion to dismiss on grounds of entrapment, or the correctness of the jury instructions given regarding entrapment.

Due process, a flexible concept "based on the concept of fairness, should afford the 'procedural protections that the given situation demands.'" *Low*, *supra*, 2004 UT 90 at ¶15 (citations omitted). Because Gardner's claims of trial error cannot be adequately reviewed without Clark's cross-examination testimony,

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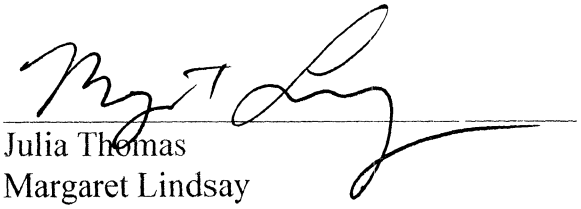
[1] Utah Code Ann. § 76-2-303 provides: "It is a defense that the actor was entrapped into committing the offense. Entrapment occurs when a peace officer or a person directed by or acting in cooperation with the officer induces the commission of an offense in order to obtain evidence of the commission for prosecution by methods creating a substantial risk that the offense would be committed by one not otherwise ready to commit it. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment."

fundamental fairness and due process demands that he be granted a new trial. This is particularly true where his constitutional rights to confrontation are likewise implicated. Accordingly, because this Court cannot conclude that the absence of the critical cross-examination testimony from the record is harmless beyond a reasonable doubt to meaningful and necessary appellate review, this Court should reverse Gardner's conviction. *Harrington v. California,* 395 U.S. 250, 254, 89 S.Ct. 1726, 1728, 23 L.Ed.2d 284 (1969); *Schneble v. Florida,* 405 U.S. 427, 430, 92 S.Ct. 1056, 1058, 31 L.Ed.2d 340 (1972); *see also Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *State v. Hartford,* 737 P.2d 200, 204 (Utah 1987).

CONCLUSION AND PRECISE RELIEF SOUGHT

Because Gardner was deprived meaningful appellate review due to the absence of that testimony most critical to Gardner's entrapment defense, due process requires that this Court reverse his conviction and remand this matter to the Third District Court for a new trial.

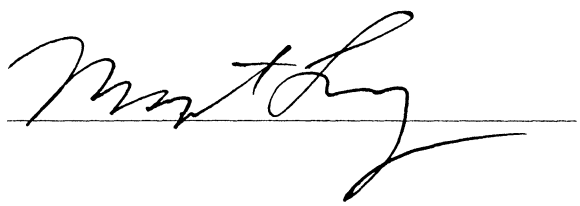
RESPECTFULLY SUBMITTED this 18th day of September, 2006.



Julia Thomas
Margaret Lindsay
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that I delivered four (4) true and correct copies of the foregoing Brief of Appellant to the Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 18th day of September, 2006.



ADDENDA

Utah Code Ann. § 76-2-303: It is a defense that the actor was entrapped into committing the offense. Entrapment occurs when a peace officer or a person directed by or acting in cooperation with the officer induces the commission of an offense in order to obtain evidence of the commission for prosecution by methods creating a substantial risk that the offense would be committed by one not otherwise ready to commit it. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

Utah Code Ann. § 78-56-105: Record of court proceedings--Duties of court reporter

(1) The Judicial Council shall by rule provide for the means of maintaining the record of proceedings in the courts of record by official court reporters or by electronic recording devices.

(2) The official court reporter assigned to a session of court shall take full verbatim stenographic notes of the session, except when the judge dispenses with the verbatim record.

(3) The official court reporter shall immediately file with the clerk of the court the original stenographic notes of the court session and the computer disk on which the notes are stored. If not already on file with the clerk of the court, the official court reporter shall file a computer disk containing the reporter's most current dictionary showing the meaning of the reporter's stenographic notes.

(4) Upon request and the payment of fees established by Section 78-56-108, the official court reporter shall transcribe the stenographic notes or video or audio recording of the court session and furnish the transcript to the requesting party.

Not Reported in P.3d, 2006 WL 181520 (Utah App.), 2005 UT App 21
(Cite as: Not Reported in P.3d)

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,

v.

Randy Shea GARDNER, Defendant and Appellant.

No. 20030371-CA.

Jan. 26, 2006.

Third District, West Valley Department, 011103725; The Honorable Terry L. Christiansen.

Margaret P. Lindsay, Orem, and Patrick V. Lindsay, Provo, for Appellant.

Mark L. Shurtleff and Kenneth A. Bronston, Salt Lake City, for Appellee.

Before Judges BENCH, BILLINGS, and THORNE.

MEMORANDUM DECISION (Not For Official Publication)

PER CURIAM:

#1 *1 Randy Shea Gardner appeals his conviction of arranging for the distribution of a controlled substance. He asserts that his conviction should be reversed and the case remanded for a new trial because the record is insufficient for a meaningful appeal. He also argues that a jury instruction was in error.

#2 Criminal defendants have the right to a "record of sufficient completeness to permit proper consideration of [their] claims." *State v. Menzies,* 845 P.2d 220, 241 (Utah 1992) (internal quotations and citation omitted). They do not, however, have a right to a perfect transcript. *See id.* Rather, the record must be adequate to allow meaningful judicial review. *See id.*

#3 "Due process requires that there be a record adequate to review specific claims of error already raised." *West Valley City v. Roberts,* 1999 UT App 358, ¶ 11, 993 P.2d 252 (internal quotations and citation omitted). Appellate courts will not presume error where a record is incomplete. *See id.* A lack of a complete record will be a "basis for remand and a new hearing only where: (1) the absence or incompleteness of the record prejudices the appellant; (2) the record cannot be satisfactorily reconstructed (i.e., by affidavits or other documentary evidence); and, (3) the appellant timely requests the relevant portion of the record." *Id.*

#4 An incomplete record may necessitate a new trial where a defendant shows that a specific error is asserted and that the missing record was critical to its resolution. *See State v Russell,* 917 P.2d 557, 559 (Utah Ct.App.1996). A defendant is not entitled to a new trial whenever there is a gap in the record, " just in case the missing record might reveal some error." *Id.* Rather, a showing of prejudice is required. *See id.* Gardner has not shown that the gap in the record has prejudiced him.

#5 Gardner asserts that the record on appeal is inadequate to determine whether there was sufficient evidence to support his conviction. He argues that the absence of the cross-examination testimony of Leland Clark means that this court cannot review whether there was sufficient evidence to show the "lack of entrapment." However, the record on appeal is complete enough to determine whether Gardner freely and voluntarily committed the acts in question because the State's case-in-chief is complete and the missing testimony would, at most, be inconsistent or contrary evidence.

#6 A conviction may be overturned for insufficiency of evidence only "when it is apparent that there is not sufficient competent evidence as to each element of the crime charged for the fact-finder to find, beyond a reasonable doubt, that the defendant committed the crime." *State v Boyd,* 2001 UT 30, ¶ 13, 25

P.3d 985 (quotations and citation omitted). Moreover, "[i]t is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses." *Id.* at ¶ 16. "When reviewing a trial wherein conflicting competent evidence was presented, we simply 'assume that the jury believed the evidence supporting the verdict.' " *Id.* at ¶ 14 (quoting *State v. Dunn,* 850 P.2d 1201, 1213 (Utah 1993)). Ultimately, in determining the sufficiency of the evidence, "so long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made, our inquiry stops." *Id.* at ¶ 16.

¶7 *2 The record is complete enough to determine that the State presented sufficient evidence for a jury to find that Gardner acted freely and voluntarily, and was not entrapped into committing the offense. The evidence showed that Gardner initiated the plan of bringing drugs into the prison, lacking only an outside supplier. Gardner demonstrated his willingness to participate in this enterprise. Kevin Pepper provided Gardner the opportunity to commit the offense by posing as an outside supplier, with Clark passing on certain contact information to Gardner. The phone conversations between Gardner and Pepper show no hesitation or confusion from Gardner in participating in a drug distribution agreement.

¶8 Even assuming that Clark's cross-examination testimony supported Gardner's defense that he was entrapped into committing the offense due to concern for his own safety and concern for a friend's financial circumstances, the testimony would present only inconsistent evidence, which the jury obviously chose not to believe. There is testimony from Clark stating that Gardner initiated the idea of bringing drugs into prison, and testimony from Pepper regarding the further arrangements. Where conflicting evidence is presented at trial, appellate courts "simply assume that the jury believed the evidence supporting the verdict." *Id.* at ¶ 14 (internal quotations and citation omitted). Given the evidence supporting the verdict, the presumption is that the jury simply did not give any significant weight to any possible testimony from Clark that would have supported entrapment. As a result, Gardner has not shown any prejudice due to the missing portion of the record.

¶9 Gardner also argues that the missing testimony is necessary to identify any other possible errors at trial. However, a defendant is not entitled to a new trial whenever a gap in the record exists just in case the gap may contain some error. *See State v. Russell,* 917 P.2d 557, 559 (Utah Ct.App.1996). Gardner overstates *Russell* as mandating reversal where a record is incomplete. In fact, *Russell* held that an incomplete record does not on its own require a new trial. *See id.* The court noted that Utah law "does not require a complete record so appellate counsel can go fishing for error; it only requires that there be a record adequate to review specific claims of error already raised." *Id.*

¶10 Gardner also asserts that the trial court erred in giving an instruction regarding the elements of entrapment. When challenging jury instructions on appeal, an appellant "cannot take advantage of an error committed at trial when that [appellant] led the trial court into committing the error" *State v Geukgeuzian,* 2004 UT 16, ¶ 9, 86 P.3d 742 (quotations and citation omitted). As a result, a jury instruction may not be assigned as error " 'if counsel, either by statement or act, affirmatively represented to the court that he or she had no objection to the jury instruction.' " *Id* (quoting *State v. Hamilton,* 2003 UT 22, ¶ 54, 70 P.3d 111). Counsel affirmatively represented to the trial court that he had no objection to the specific instruction now appealed. Thus, Gardner is precluded from challenging this instruction on appeal.

*3 Accordingly, Gardner's conviction is affirmed.

Utah App.,2006.
State v. Gardner
Not Reported in P.3d, 2006 WL 181520 (Utah App.), 2005 UT App 21

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IN THE SUPREME COURT OF THE STATE OF UTAH

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State of Utah,

Plaintiff and Respondent,

v.

Case No. 20060281-SC
20030371-CA

Randy Shea Gardner,
Defendant and Petitioner.

ORDER

This matter is before the court upon a Petition for Writ of certiorari, filed on March 27, 2006.

IT IS HEREBY ORDERED, pursuant to Rule 45 of the Utah Rules of Appellate Procedure, the Petition for Writ of Certiorari is granted as to the following issue:

Whether due process necessitated review of the cross-examination testimony of one of the State's witness, where Petitioner claimed entrapment, the recorded transcript does not include the cross-examination testimony, and the court of appeals did not address the district court's proposed reconstruction of that testimony.

A briefing schedule will be established hereafter. Pursuant to rule 2, the court suspends the provision of rule 26(a) that permits the parties to stipulate to an extension of time to submit their briefs on the merits. The parties shall not be permitted to stipulate to an extension. Additionally, absent extraordinary circumstances, no extensions will be granted by motion. The parties shall comply with the briefing schedule upon its issuance.

For The Court:

Dated July 21, 2006

Christine M. Durham
Chief Justice